No. 89-922

In the Supreme Court of the United States

OCTOBER TERM, 1989

MANU PATEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether statements made by a co-conspirator to petitioner after petitioner had been arrested were made during the course of and in furtherance of the conspiracy, and were therefore admissible under Fed. R. Evid. 801(d)(2)(E).

2. Whether petitioner had withdrawn from the conspiracy at the time the statements were made, when he had been arrested and was cooperating with the government but was still concealing his own involvement in the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 879 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1989. A petition for rehearing was denied on August 29, 1989, and an amended order denying rehearing was entered on September 6, 1989 (Pet. App. B1, C1). The petition for a writ of certiorari was filed on October 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

on one count of conspiracy to possess hashish with intent to distribute it, in violation of 21 U.S.C. 846; one count of conspiracy to import hashish, in violation of 21 U.S.C. 963; one count of importation of hashish, in violation of 21 U.S.C. 952; and one count of possession of hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 17-1/2 years' imprisonment, to be followed by five years' supervised release. He was also fined $20,000.

The evidence at trial established that petitioner was the owner of a company that in January 1988 received a shipment from the Apex Trading Agency in Bombay, India. The customs documents showed that the 67 crates in the shipment contained wooden furniture and handicrafts, but in the course of a random examination of one of the crates, a Customs inspector found that it contained blocks of hashish. A drug detecting dog indicated that seven or eight additional crates contained drugs. The shipment was allowed to go on its way, with federal agents watching its delivery. Petitioner received the shipment at a warehouse, where he had the crates stored. When petitioner returned a few days later to move the shipment, federal agents arrested him. The agents told petitioner that he was being arrested for possession of hashish with intent to distribute it, and asked him if he would cooperate with the government. Petitioner showed surprise, said that he had nothing to hide, and agreed to cooperate with the government. Pet. App. A2; Gov't C.A. Br. 6-8.

Petitioner told the agents that this was the third shipment he had received from his partner in India, Navin Sheth; the first two, he said, had contained spices and groceries. Petitioner said that Sheth would soon call him from India to tell him how to distribute the latest shipment. After each of the two earlier shipments, petitioner added, Sheth had come from India and, together with two other Indian men,

had taken parts of the shipments away before anything had been uncrated. Pet. App. A2; Gov't C.A. Br. 10.

Petitioner agreed to make a recorded telephone call to Sheth in which he would tell Sheth that he had discovered hashish in the shipment when one of the crates had broken open during unloading. Several calls were subsequently made; the conversations were conducted in an Indian dialect, and each was recorded, translated, and transcribed. As a result of the information conveyed by Sheth in those calls and information obtained from calls placed by petitioner to the American members of the conspiracy, all those involved except Sheth were arrested. Pet. App. A2-A3; Gov't C.A. Br. 11-15.

After the conversations between petitioner and Sheth were translated and transcribed, it was clear that the story petitioner had told the DEA was false, as was his claim of ignorance that the shipment contained hashish. In the first call, for example, Sheth expressed surprise that petitioner said that he did not recall when and how the shipment would be distributed. Sheth replied that petitioner had been told about it and asked, "Why did you forget?" Sheth reminded petitioner that he was to call himself "Raj" and that someone else calling himself "John" would call him at a certain time. Petitioner used the word "hashish" several times, and at one point Sheth asked, "Why are you using those words?" * * * You know about all this to be not using them." Pet. App. A3; Gov't C.A. Br. 15-18.

Transcripts of the recorded conversations between petitioner and Sheth were introduced at petitioner's trial, over his objection. Petitioner argued that Sheth's statements were not properly admitted as a co-conspirator's statements under Fed. R. Evid. 801(d)(2)(E) because the conspiracy had terminated by the time he spoke with Sheth or, at least, he had withdrawn from the conspiracy by that time. The district court rejected those arguments, and the court of

appeals did likewise. The court of appeals referred to the principle adopted by it and other courts of appeals that withdrawal from a conspiracy is not shown by mere cessation of activity. Rather, "there must also be affirmative action, either the making of a clean breast to the authorities, or communication of the abandonment in a manner calculated to reach co-conspirators." Pet. App. A6, (quoting *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.)). Because petitioner had lied about his involvement in the conspiracy and had continued to try to hide his complicity while talking on the phone to Sheth, and perhaps had even attempted to alert Sheth that the authorities knew of the smuggling scheme, the court of appeals found that the statements made by Sheth that incriminated petitioner were made during the course of the conspiracy and in furtherance of it. Pet. App. A7.

ARGUMENT

1. Petitioner first contends (Pet. 10-16) that Sheth's statements incriminating him were erroneously admitted as co-conspirator declarations because, at the time of the telephone calls, petitioner had been arrested and the hashish had been seized, so that the objectives of the smuggling conspiracy had been defeated and the conspiracy had therefore terminated. He claims that the decision of the courts below rejecting that argument is inconsistent with decisions of this Court and the courts of appeals. In fact, there is no conflict on this issue. The finding in this case that the statements were made during the course of an ongoing conspiracy is fully consistent with the rules established by this Court and the courts of appeals for determining when a conspiracy has ended.

The courts of appeals have recognized that there is no simple test for determining when a conspiracy has termi-

nated; such a finding depends on the particular facts of each case. *United States* v. *Aquafredda*, 834 F.2d 915, 919 (11th Cir. 1987), cert. denied, 108 S. Ct. 1278 (1988); *United States* v. *Persico*, 832 F.2d 705, 715-716 (2d Cir. 1987), cert. denied, 108 S. Ct. 1995 (1988); *United States* v. *Varella*, 692 F.2d 1352, 1362 (11th Cir. 1982), cert. denied, 463 U.S. 1210 (1983); *United States* v. *Hickey*, 596 F.2d 1082, 1089-1090 (1st Cir.), cert. denied, 444 U.S. 853 (1979). It is clear that neither the arrest of some of the co-conspirators nor the impossibility of successfully completing the goals of the scheme necessarily means that the conspiracy has terminated. In a number of cases, including five of the seven cases petitioner cites (Pet. 12-13), courts have held that the conspiracy continued after the arrest of one or more of the conspirators. *E.g.*, *United States* v. *Casamayor*, 837 F.2d 1509, 1513 (11th Cir. 1988), cert. denied, 109 S. Ct. 813 (1989); *United States* v. *Persico*, 832 F.2d at 715-716; *United States* v. *Taylor*, 802 F.2d 1108, 1117 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987); *United States* v. *Towers*, 775 F.2d 184, 189 (7th Cir. 1985); *United States* v. *Ammar*, 714 F.2d 238, 253-254 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Guerro*, 693 F.2d 10, 13 (1st Cir. 1982); *United States* v. *Varella*, 692 F.2d at 1362; *United States* v. *Saavedra*, 684 F.2d 1293, 1299 (9th Cir. 1982).[1]

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[1] The two other cases petitioner cites, *United States* v. *Meacham*, 626 F.2d 503 (5th Cir. 1980), on reh'g, 676 F.2d 1359 (11th Cir.), cert. denied, 459 U.S. 1040 (1982), and *United States* v. *Killian*, 524 F.2d 1268 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976), do not conflict with the decision below. In *Killian*, the court, in affirming the defendants' convictions, merely noted that it thought that certain post-arrest statements would not have been admissible against the defendants who did not make the statements. 524 F.2d at 1272. In *Meacham*, the court, while concluding that the conspiracy in that case had ended when the conspirators were arrested, distinguished its conclusion from the holding of *United States* v. *Grubb*, 527 F.2d 1107 (4th Cir. 1975), where the court had concluded that statements made after the arrest of some

In *Taylor*, for example, the defendant was unaware that his co-conspirators had been arrested trying to sell blank corporate bonds to an undercover FBI agent. The next day agents recorded Taylor's telephone conversation with a stockbroker in which Taylor "was seeking to carry out [the conspiracy's] next step—receipt of his commission for introducing the buyer and seller." 802 F.2d at 1117. In these circumstances, the court of appeals held that Taylor was still operating in furtherance of the conspiracy when he made the telephone call and that his statements were therefore admissible against the arrested co-conspirators under Rule 801(d)(2)(E). 802 F.2d at 1117. In *Varella*, the court of appeals upheld the admission of statements made by several conspirators following their arrest and the seizure of the marijuana they had been planning to import and distribute. The court found that the conspiracy clearly extended beyond the date of the arrests and seizure because the conspirators had made continuing efforts to find out what had become of the marijuana, discussed how to minimize their losses, and debated the apportionment of the loss and possible recovery through another importation. 692 F.2d at 1361-1362.

Nor does it matter that it has become impossible for the conspiracy to succeed, or even that its ends were from the beginning unattainable. *United States* v. *Bounos*, 730 F.2d 468, 470 (7th Cir. 1984); *United States* v. *Shively*, 715

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conspirators were admissible under Rule 801(d)(2)(E). 626 F.2d at 510-511 n.8. It thus recognized that a conspiracy may continue beyond the arrest of some of the conspirators. The court concluded that the conspiracy had terminated at the time of the arrest in *Meacham* because "[t]he evidence introduced at trial showed that the defendants' criminal activities ended" at that time. 626 F.2d at 511 n.8. In this case, in contrast, the evidence showed that the conspirators other than petitioner continued to seek to distribute the hashish after petitioner's arrest.

F.2d 260, 266 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Hamilton*, 689 F.2d 1262, 1269 (6th Cir. 1982) (conspiracy continued even though co-conspirator was arrested and acting as government agent; "it is no defense that success was impossible because of unknown circumstances"), cert. denied, 459 U.S. 1117 (1983). "Success is never a necessary attribute of a conspiracy." *United States* v. *Guerro*, 693 F.2d at 13.

The facts of this case fit easily within the guidelines offered by these and other cases. The other conspirators had no knowledge of petitioner's arrest and cooperation with the government when they talked to him about further arrangements for the distribution of the hashish. The conspiracy clearly continued after petitioner's arrest and the statements made by Sheth were made in furtherance of the scheme.

Nor, contrary to petitioner's contention (Pet. 14), is this conclusion inconsistent with *Krulewitch* v. *United States*, 336 U.S. 440 (1949). In that case the Court found that the conspiracy had definitely ended before the statements at issue were made. But as the Court noted, the conversation in question occurred long after the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had ended. The trip to Florida had already been made, the complaining witness had left Florida and resumed her residence in New York, and all those involved had been arrested. 336 U.S. at 442. The Court's holding that in those circumstances the conspiracy had ended says nothing about the quite different facts of this case, where the hashish had not been distributed at the time of the conversations.[2]

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[2] Petitioner complains (Pet. 15) that the cases relied on by the government in the court of appeals dealt only with the question whether a defendant may be found guilty of conspiracy, and not with the

2. Petitioner also contends (Pet. 16-20) that the court of appeals erred by holding that he had not adequately shown his withdrawal from the conspiracy. Once again, however, the holding of the court below on this fact-bound issue is in complete accord with other decisions.

As the court of appeals noted (Pet. App. A5), the courts are in agreement that in order to establish one's withdrawal from a conspiracy, mere cessation of activity is not enough. Some affirmative act of withdrawal is required, typically either a full confession to the authorities or some communication to one's co-conspirators that one has abandoned the conspiracy. And it is the defendant's burden to demonstrate withdrawal. *United States* v. *Juodakis*, 834 F.2d 1099, 1102 (1st Cir. 1987); *United States* v. *Troutman*, 814 F.2d 1428, 1447-1448 (10th Cir. 1987); *United States* v. *Walker*, 796 F.2d 43, 49 (4th Cir. 1986); *United States* v. *Andrus*, 775 F.2d 825, 850 (7th Cir. 1985); *United States* v. *Lewis*, 759 F.2d 1316, 1347-1348 (8th Cir.), cert. denied, 474 U.S. 994 (1985); *United States* v. *Gibbs*, 739 F.2d 838, 845 (3d Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *United States* v. *Jannotti*, 729 F.2d 213, 221 (3d Cir.), cert. denied, 469 U.S. 880 (1984); *United States* v. *Garrett*, 720 F.2d 705, 714 (D.C. Cir. 1983), cert. denied, 465 U.S. 1037

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question whether statements offered under the co-conspirator exception to the hearsay rule were made in furtherance of the conspiracy. In our view, a determination concerning the duration and termination of a conspiracy is the same whether made for purpose of determining a defendant's membership in the conspiracy or for the purpose of determining whether to admit evidence of statements made in furtherance of the conspiracy. In any event, a number of the cases cited above dealt specifically with the precise issue raised in this case, whether statements were admissible under Rule 801(d)(2)(E) as having been made during the course of and in furtherance of the conspiracy. *E.g.*, *United States* v. *Casamayor*, 837 F.2d at 1513; *United States* v. *Taylor*, 802 F.2d at 1117; *United States* v. *Guerro*, 693 F.2d at 13; *United States* v. *Varella*, 692 F.2d at 1362.

(1984); *United States* v. *Phillips*, 664 F.2d 971, 1018 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965). This Court has also approved the same general formulation, that is, that some affirmative act is necessary to demonstrate withdrawal. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 463-465 (1978); see also *Hyde* v. *United States*, 225 U.S. 347, 369 (1912).[3]

The reasoning behind the rule that a defendant must show an affirmative act demonstrating withdrawal was explained by the court of appeals. First, the informal nature of a conspiracy makes it more difficult than in the case of a formal contract to know the exact extent of one person's participation. "A period of quiescence," therefore, "cannot be equated with a clean break." Pet. App. A6. Second, the

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[3] Petitioner criticizes (Pet. 19) the court of appeals' characterization of the *Gypsum* case as implicitly endorsing its formulation of the necessary showing for withdrawal. He points out that in *Gypsum* this Court reversed a conviction because an instruction confined the allowable methods for proving withdrawal to only two—either notifying the conspirators of withdrawal from the scheme or disclosing the illegal scheme to the authorities. However, the Court approved the general rule that some affirmative behavior must be shown in order to establish withdrawal. 438 U.S. at 464-465. The problem in *Gypsum* was that the facts of the case allowed another logical method for showing withdrawal—specifically, the resumption of competitive behavior, such as price cutting or price wars—as an affirmative action that would show withdrawal from a price-fixing conspiracy. And although the defense in the *Gypsum* case argued just such a theory, the trial court refused to include in the jury instructions a charge that such an affirmative act demonstrated withdrawal. 438 U.S. at 463-464.

The court of appeals' decision in this case does not conflict with the *Gypsum* decision. The court quoted a case that mentioned the same two methods of withdrawal in the *Gypsum* instruction, but the court also specifically stated that there were other ways to withdraw from a conspiracy. Pet. App. A5. In this case, however, petitioner did not show that he withdrew by some other method.

law must act to prevent a conspirator from limiting his responsibility for setting in motion a criminal scheme merely by ceasing his own participation. As the court below put it, "[y]ou do not absolve yourself of guilt of bombing by walking away from the ticking bomb." *Ibid.*; see also *Hyde* v. *United States*, 225 U.S. at 369-370 ("[a]s he has started evil forces he must withdraw his support from them or incur the guilt of their continuance").

The fact that petitioner had been arrested and was purporting to cooperate with the authorities did not suffice in this case to constitute withdrawal. As the court of appeals noted (Pet. App. A6-A7), petitioner did not reveal the true nature of the conspiracy and his own involvement in it when he agreed to cooperate. His false representations as well as his efforts in his telephone call to Sheth to obscure his own complicity aroused Sheth's suspicions and probably contributed to the government's failure to apprehend Sheth, who was apparently the kingpin of the smuggling operation. *Ibid.* Petitioner's misleading pretense of full cooperation cannot be considered the kind of affirmative act necessary to show his clear abandonment of the conspiracy. See *United States* v. *Taylor*, 802 F.2d at 1117.

Petitioner also claims (Pet. 18) that the holding of the court of appeals results in a rule that requires a defendant to make an unconstitutional choice between incriminating himself and protecting himself from the use of his co-conspirators' statements. But the government has forced no such choice. Petitioner could simply have remained silent when he was arrested and refused to offer any cooperation to the authorities. Or he could have contacted the others involved on his own and made it clear to them that he was playing no further part in their scheme. But he cannot claim the right to lie to the government and then expect the law's protection of his choice. See *Bryson* v. *United States*, 396 U.S. 64, 72 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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